

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>CAROLE BODINE</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 193,789
<b>GREAT BEND PACKING COMPANY, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>NATIONAL UNION FIRE INSURANCE COMPANY</b>	)	
<b>and TRAVELERS INSURANCE COMPANY</b>	)	
Insurance Carriers	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Claimant, respondent and the Workers Compensation Fund appeal the Award of Administrative Law Judge Bruce E. Moore dated October 29, 1998. In the Award, the Administrative Law Judge granted claimant a 12 percent whole body functional impairment as a result of injuries suffered with respondent June 29, 1993, through August 3, 1993. The Administrative Law Judge further granted claimant a 9 percent impairment of function to the right upper extremity as a result of a June 11, 1996, injury. The Administrative Law Judge did not grant respondent's request to reduce claimant's right upper extremity award for an alleged preexisting impairment. Oral argument was held June 23, 1999.

**APPEARANCES**

Claimant appeared by her attorney, Mark A. Rondeau appearing for Allen G. Glendenning of Great Bend, Kansas. Respondent and its insurance carriers appeared by their attorney, Orvel B. Mason of Arkansas City, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Gail Carpenter of Great Bend, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The record and stipulations set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board for the purpose of this award.

### **ISSUES**

- (1) Should the Board consider the opinion of Dr. James Hopkins regarding claimant's functional impairment or is Dr. Hopkins' opinion defective for failing to use the appropriate version of the AMA Guides to the Evaluation of Permanent Impairment?
- (2) Are respondent and Kansas Workers Compensation Fund entitled to a reduction in the amount of claimant's preexisting functional impairment for the injury suffered on June 11, 1996?
- (3) What is the nature and extent of claimant's injury and/or disability as it relates to the June through August 1993 injuries and as it relates to the June 11, 1996, injury?

The respondent and Fund originally alleged a credit for temporary partial disability compensation paid during the litigation of this action. However, at oral argument the issue was removed from the Board's consideration by stipulation of the parties. In addition, the parties stipulated that National Union Fire Insurance Company provided respondent with workers' compensation coverage during the period June 29, 1993, through August 3, 1993, and Travelers Insurance Company provided coverage for the June 11, 1996, accident.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

#### **FINDINGS OF FACT**

Claimant suffered separate personal injuries by accident arising out of and in the course of her employment with respondent in two separate incidents involving her upper extremities. After working approximately two years on the boning line, claimant began experiencing discomfort in her thumbs with the left being worse than the right. In June 1993, claimant reported the difficulties to respondent and, after a period of conservative care with Dr. C. Reiff Brown, was referred to Dr. James Gluck, a board certified orthopedic surgeon specializing in treating upper extremity injuries. Dr. Gluck first examined claimant on July 20, 1993, and diagnosed bilateral carpal metacarpal joint (CMC joint) arthrosis. On

August 3, 1993, Dr. Gluck performed a left thumb ligament reconstruction with tendon interposition and tendon transfer. The treatment was successful and claimant did well after the surgery. While claimant had some complaints to the right thumb, these complaints were not severe enough to warrant surgery. Claimant was found to have reached maximum medical improvement and released to return to work on May 6, 1994. At that time, Dr. Gluck rated claimant at 10 percent to the left hand and 3 percent to the right hand. Dr. Gluck's May 6, 1994, report equates that to a 12 percent whole person impairment, but by letter of June 4, 1994, he adjusted and corrected the impairment rating to a 7 percent whole person impairment.

Claimant continued working for respondent until March 27, 1996, at which time she returned to Dr. Gluck with renewed complaints to the right thumb. Claimant had undergone treatment with Dr. Brown and also Dr. Mark Melhorn before being referred back to Dr. Gluck, who again diagnosed arthrosis of the right CMC joint. On June 11, 1996, Dr. Gluck performed a right thumb ligament reconstruction with tendon interposition. Again claimant progressed well after surgery and was released to work, having attained maximum medical improvement on March 13, 1997. Dr. Gluck rated claimant at a 10 percent impairment to the right hand which equates to a 9 percent impairment of the right upper extremity.

Claimant was also evaluated by Dr. James B. Hopkins at her attorney's request on October 28, 1994. Dr. Hopkins is board certified with the American College of Surgeons and the American Society of Plastic and Reconstructive Surgery and is a member of the American Academy of Disability Evaluating surgeons and, as of the time of this evaluation, limited his practice exclusively to performing disability evaluations. Using the Third Edition of the AMA Guides, Dr. Hopkins rated claimant at 25 percent impairment to the right upper extremity at the level of the forearm and 30 percent impairment to the left upper extremity at the level of the forearm. Dr. Hopkins' total rating was a 30 percent whole body functional impairment from the 1993 injuries. Dr. Hopkins saw claimant only once in 1994 and no time thereafter and, therefore, offers no opinion as to any resulting impairment from the 1996 injury.

Respondent contends that Dr. Hopkins' opinion utilized the AMA Guides, Third Edition, for this evaluation. However, K.S.A. 44-510e, applicable for a July 1993 injury, requires that the Third Edition (Revised) of the AMA Guides be used when considering a functional impairment. Dr. Hopkins was asked whether it would matter whether the AMA Guides, Third Edition, or the AMA Guides, Fourth Edition, was used, and he did testify that it made no difference. However, at no time during Dr. Hopkins' deposition was the AMA Guides, Third Edition (Revised), discussed. The AMA Guides, Third Edition, was first published in 1988 and the AMA Guides, Third Edition (Revised), was first published in 1990.

#### CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, the burden of proof is on claimant to establish his or her right to an award of compensation by proving the various conditions upon which his or her right depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g).

The Administrative Law Judge combined Dr. Gluck's and Dr. Hopkins' impairment ratings and awarded claimant a 12 percent whole person impairment as a result of the 1993 bilateral thumb injuries. However, the Appeals Board finds Dr. Hopkins' opinion, which utilized the AMA Guides, Third Edition, is in violation of K.S.A. 44-510e, applicable for a 1993 injury. The statute requires that the AMA Guides, Third Edition (Revised), be utilized when providing impairment ratings. Dr. Gluck's opinion referenced the AMA Guides, Fourth Edition, but when asked, Dr. Gluck acknowledged that the charts in the Third Edition (Revised) and the Fourth Edition are identical and there would be no difference in the impairment ratings, regardless of which version was used. The Appeals Board, therefore, finds that the only opinion acceptable under K.S.A. 44-510e is that of Dr. Gluck and claimant is awarded a 7 percent whole person functional impairment as a result of the injuries suffered through a series of injuries culminating on August 3, 1993.

K.S.A. 1996 Supp. 44-501(c) states in part:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

Claimant was diagnosed both in 1993 and 1996 with arthrosis of the right CMC joint. In 1993, claimant was assessed a 3 percent impairment to the right hand by Dr. Gluck. In 1996, claimant was assessed a 10 percent impairment to the right hand again by Dr. Gluck. Dr. Gluck's opinion regarding the 1996 impairment is uncontradicted. The Appeals Board finds, in considering both the 1993 injuries and the 1996 injuries, that claimant has suffered a 10 percent impairment to the right hand, 3 percent of which is preexisting. Claimant, therefore, has a 7 percent functional impairment to the right hand for the injuries suffered on June 11, 1996. As the surgery and the impairment occur at the base of the thumb, which is part of the hand, the Appeals Board finds that claimant's award for the 1996 injury is limited to the hand.

Wherefore, the Appeals Board finds that the Award of the Administrative Law Judge should be modified to reflect the opinions expressed above.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that an Award is granted in favor of the claimant, Carole Bodine, and against the respondent, Great Bend Packing Company, Inc., and its insurance carriers, National Union Fire Insurance Company and Travelers Insurance Company, and the Kansas Workers Compensation Fund, for injuries occurring through August 3, 1993, and on June 11, 1996.

For the August 3, 1993, accident, claimant is entitled to 13.72 weeks of temporary total disability compensation at the rate of \$266.11 per week in the amount of \$3,651.03, followed by 29.05 weeks permanent partial disability compensation at the rate of \$266.11 per week totaling \$7,730.50, for a 7 percent whole person functional impairment, for a total award of \$11,381.53, all of which is due and owing at the time of this Award and ordered paid in one lump sum minus any amounts previously paid.

For the June 11, 1996, accident, claimant is entitled to 5.62 weeks of temporary total disability compensation at the rate of \$248.23 per week totaling \$1,395.05, followed by 10.11 weeks permanent partial disability on a functional basis at the rate of \$248.23 per week totaling \$2,509.61, for a total award of \$3,904.66, and a 7 percent permanent partial loss of use of the right hand. At the time of this Award, the entire amount is due and owing and ordered paid in one lump sum minus any amounts previously paid.

Claimant is further entitled to medical expenses pursuant to the stipulation of the parties and any unauthorized medical expenses, if any, upon presentation of an itemized statement verifying same.

Future medical will be considered upon proper application to and approval by the Director. The claimant's attorney fee contract is approved insofar as it does not contravene the applicable version of K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Owens, Brake, Cowan & Associates	
Regular Hearing Transcript	\$148.32
Dated February 5, 1998	
Transcript of Proceedings	\$417.85
Dated June 4, 1998	
AAA Reporting Company	
Deposition of Dr. James Hopkins	\$286.95
Dated September 9, 1997	
Ireland Court Reporting	
Deposition of Dr. James Gluck	\$211.28

Dated August 3, 1998

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Allen G. Glendenning, Great Bend, KS  
Orvel B. Mason, Arkansas City, KS  
Gail Carpenter, Great Bend, KS  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director